In the Supreme Court of the United States

OCTOBER TERM, 1941

JOHN C. GETZ, R. P. LYMAN, Jr. and DANIEL W. GOODENOUGH,

Petitioners,

vs.

TOWN OF BELLEAIR, a Municipal Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

May it please the Court: The Petitioners, John C. Getz, R. P. Lyman, Jr. and Daniel W. Goodenough, respectfully show to this Honorable Court:

Petitioners are residents of the State of Michigan. Defendant is a municipal corporation organized by Chapter 10335, Laws of Florida, 1925. It is the successor of the Town of Belleair Heights which was incorporated by Chapter 9686, Laws of Florida, 1923, and is liable for the debts of its predecessor. The amount in controversy exceeds $3,000. exclusive of interest and costs.

STATEMENT OF THE CASE

This suit is for a judgment upon past due coupons representing interest accrued on "Public Improvement Bonds" issued by the former Town of Belleair Heights. The bonds were dated as of July 1, 1924, mature July 1, 1954, and are described in Paragraph 3 (page 2). The coupons are described in Paragraph 5 (a), (page 4), (Exhibit 2, p. 9). (Other bonds and coupons originally sued on have been disposed of and are not now involved in this suit). Each bond (Exhibit 1, p. 7) recites that it was issued

> "for the purpose of providing funds for the construction of wharves, ship channels, parks, drives and boulevards in the Town of Belleair Heights, Florida, and is issued in pursuance of the affirmative vote of a majority of the electors of said Town qualified to vote on the question, voting at an election duly called and legally held for that purpose, and pursuant to ordinances and resolutions of said Town duly passed, ordained, approved and adopted as required by law and in pursuance to and in full compliance with all the require-

ments of the Constitution and laws of the State of Florida, including the provisions of its Charter, said Charter being Chapter 9686 of the Acts of the Legislature of Florida for the year 1923."

On each bond there was endorsed the following certificate of the Clerk of the Circuit Court of the Sixth Judicial Circuit of Pinellas County, Florida:

> "Validated and confirmed by decree of the Circuit Court of the Sixth Judicial Circuit of the State of Florida, in and for Pinellas County; dated the 28*th day of July, A. D.* 1924."

That certificate was authorized by Section 2, Chapter 6868, Laws of Florida, 1915, Section 5126, C. G. L. 1927, (See Appendix A). By Section 4 of that chapter such a decree is

> "forever conclusive as to the validity of the bonds against the City and its taxpayers, and that the validity of the bonds shall never be called in question in any court of this State."

Defendant answered the Complaint (pp. 29-46). On August 5, 1936, the Supreme Court of Florida decided the case of *Olds v. Alvord*, 191 So. 424. Plaintiffs amended their Complaint (See Amendment pp. 51-53), reciting that decision holding the bonds void, Petitioners' ownership of seventy-five bonds, and, as an alternative claim for relief, sought recovery of money had and received by the Town from the sale of the bonds.

Defendant answered the amended Complaint (pp. 53-55). On September 7, 1940, the District Court (p. 154)

held that the bonds were void and recovery could not be had upon the coupons because of the decision of the Florida Court in *Olds v. Alvord,* supra; but that the amended Complaint set forth a case for relief for money had and received. Defendant then filed an "Additional Defense" (pp. 55 et seq.) alleging that the judgment of the State Court in *Olds v. Alvord,* supra, was res judicata of the right of Plaintiffs to recover for money had and received, because that suit was an action against bondholders as a class. Defendant moved for summary judgment; the motion was granted (pp. 146-8) and the Complaint was dismissed without day.

Petitioners appealed to the Circuit Court of Appeals. That court held that it was not necessary for it to determine (*and it did not determine*) whether *Olds v. Alvord* was a class suit and binding on Petitioners; because it said that the decision of the State Supreme Court that bonds of the Town dated July 1, 1924, were void because the Town had no power to issue them, and that the decree of the Circuit Court, July 28, 1924, validating the bonds did not cure such want of power, was conclusive, and the Federal Court was bound by that decision.

It reversed the summary judgment entered by the District Court;- holding that the right of Petitioners to recover for money had and received had not been adjudged by the State Court; it remanded the case for a trial of that issue under the laws of Florida.

Since the bonds do not mature until 1954, Petitioners cannot have a right to sue for money had and received on the bonds unless the bonds are void. The validity of the

bonds, as such, must first be determined. If the bonds are valid, there can be no recovery upon a common count. Only if the bonds are void can there be a recovery of the principal.

If the District Court should enter judgment against the right of Petitioners to recover on quantum meruit, Petitioners could not, on a second appeal, contend the bonds are valid, since they would be concluded by the recent decision of the Circuit Court of Appeals. Petitioners' only remedy, therefore, for the correction of the error of the lower courts is by this petition at this time.

Application is hereby made to this Court for a Writ of Certiorari to review the decree of the Fifth Circuit Court of Appeals dated June 2, 1941, on the following grounds:

I.

The Fifth Circuit Court of Appeals has decided an important question of Federal law in direct conflict with a long line of applicable decisions of this Court beginning with *Rowan v. Runnells*, 5 How. 134, 12 L. ed. 85. The principle announced in that case, though stated differently, was applied in *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520, in *Douglas v. Pike County*, 101 U. S. 677, 25 L. ed. 968, and in numerous other cases: It is that

> "after a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is,

to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

(That is to say, a change of decision is given a prospective operation, but not a retroactive one).

Ohio v. DeBolt, 16 How. 416, 14 L. ed. 997
Anderson v. Santa Anna Twp., 116 U. S. 356, 29 L. ed. 633
Havemeyer v. Iowa, 3 Wall. 294, 18 L. ed. 38
Lee Co. v. Rogers, 7 Wall. 181, 19 L. ed. 161
Kenosha v. Lamson, 9 Wall. 477, 19 L. ed. 725
Olcott v. Fond du Lac Co., 16 Wall. 678, 21 L. ed. 382
Block v. Bourbon Co., 99 U. S. 686, 25 L. ed. 491
Taylor v. Ypsilanti, 105 U. S. 60, 26 L. ed. 1008
Ralls Co. v. Douglas, 105 U. S. 728, 26 L. ed. 957
New Buffalo Twp. v. Cambria Iron Co., 105 U. S. 73, 26 L. ed. 1024
Mitchell v. Burlington, 4 Wall. 270, 18 L. ed. 350
Green Co. v. Conness, 109 U. S., 104, 27 L. ed. 872
Louisiana v. Pillsbury, 105 U. S. 278, 26 L. ed. 1090
Knox Co. v. Ninth Nat. Bank, 147 U. S. 91, 37 L. ed. 93
Wade v. Travis Co., 174 U. S. 499, 43 L. ed. 1060
Loeb v. Columbia Twp., 179 U. S. 472, 45 L. ed. 280
U. S. ex rel v. Butz vs. Muscatine, 8 Wall. 575, 19 L. ed. 470

The Court of Appeals in its opinion did not refer to this principle, nor to any of these cases, although the point was urged in Petitioners' brief, filed in the Circuit Court of Appeals. The lower courts ignored the pertinent fact that

in 1924 *a State Court of general jurisdiction* (the Circuit Court) *had finally adjudicated Petitioners' bonds to be valid before the bonds were sold by the municipality.*

Thus there is here presented clearly to this Court a most important question of law: Did the decision of this Court in *Erie R. R. Co. v. Tompkins,* 304 U. S. 64, 82 L. ed. 1188, reverse the long line of decisions above referred to? The lower courts by holding that *Olds v. Alvord,* supra, was binding on them apparently assumed that the earlier cases have been reversed, though neither in *Erie R. R. Co. v. Tompkins,* supra, nor in any subsequent opinions following that decision has this Court said that *Rowan v. Runnells, Gelpcke v. Dubuque, Douglas v. Pike County* and similar cases *have been overruled or reversed nor has it intimated that they have been overruled or modified.*

The question in this case, therefore, is not whether the Federal Court should apply the law of Florida, but rather it is a question of *what law of Florida it should apply,* the law of Florida of 1924 (the date the contract was entered into between the municipality and holders of its bonds,) or the law announced by the State Court in 1939, after the bonds had come into the hands of bona fide holders; whether the power of state courts to invalidate contracts is unlimited?

The principle announced in *Douglas v. Pike County* was first adopted in England, and has been generally accepted by all American courts. Statutes in existence at the time a contract is made are regarded as in effect a part of a contract, and subsequent amendments are given only pros-

pective operation. The principle has been extended to include judicial decisions, particularly decisions construing a statute; such decisions are to be and have been regarded as a part of the statute and therefore as much a part of contracts entered into in reliance upon them as the statutes themselves. It has been the law of Florida since 1851.

The Supreme Court of Florida in *Heyward and Austin vs. LeBaron,* 4 Fla. 404, held that a contract made in 1839, while Florida was a Territory, should be construed and adjudged by a decision of the Supreme Court of the United States in 1835 when Florida was a Territory, because that decision construed a statute of the Territory, and thereby became a part of the contract. It was the applicable law at the time the contract was made.

In 1869, the Florida Supreme Court decided *Columbia County v. King,* 13 Fla. 451, involving the validity of bonds of a county. That case has been cited more than any other case decided by the Supreme Court of Florida. In its opinion, the Court quoted from *Gelpcke v. Dubuque,* supra, and cited that decision of this Court as authority for refusing to reverse its earlier decision in *Cotton v. Leon County,* 6 Fla. 610, (1856), holding valid the legislative act under which the bonds were issued. It said that for it to hold such bonds void after the bonds had been issued, and after they had passed into the hands of third parties "sanctioned by the judicial department and the acquiescence of the people" would be "an outrage upon public justice, public credit and the rights of the holders for value of these bonds".

That decision has been repeatedly referred to and cited by the Florida Supreme Court as authority for holding that the law in force at the time a contract is made is as much a part of the contract as if it had been incorporated therein.

State v. Tampa Water Works Co.
56 Fla. 858, 47 So. 358
McCaskill v. Union Naval Stores
59 Fla. 571, 52 So. 961
Cary and Co. v. Hyer, 91 Fla. 322, 107 So. 684
Humphreys v. State,
108 Fla. 92, 145 So. 858
State v. Raulerson,
129 Fla. 346, 176 So. 270
City of Bradenton v. Fusillo,
134 Fla. 759, 184 So., 234
Bedell v. Lassiter,
143 Fla., 43, 196 So. 699

In *State ex rel Nuveen v. Greer*, 88 Fla., 249, 102 So. 739, Justice Whitfield on rehearing said that

> "rights acquired under a statute while it was judicially held to be valid, were legally acquired, as the law was then authoritatively interpreted, and such rights may be protected by the organic provision securing *the inalienable right of acquiring, possessing, and protecting property, which accords with the plainest principles of justice*".

(The italicized language is taken from Sec. 1 of the Declaration of Rights in the Constitution of Florida).

As recently as 1936, Justice Davis in *Lee v. Bond Howell Lumber Co.*, 123 Fla. 202, 166 So. 733, cited the *Gelpcke* case and said:

"respectable courts in the United States have uniformly held that *** if a practical situation has come about during which it appears that the statute was declared void or a particular construction of it adopted at one time, and afterwards *** the courts have at a later date reconsidered and adjudged such statute to be valid or construed it differently, that intervening transactions should be governed, and pre-existing rights involved therein protected, according to the rule of the first judicial decisions rendered, so long as that judicial decision was allowed to stand and be understood and acted on by the people as the applicable law of the land for the time being *** this rule has been adopted because the injustice and oppression of any other rule would be so great as to be judicially intolerable."

The case did not involve municipal bonds, but the validity of a tax upon chain stores, collection of which had been enjoined for a period of months pending a final decision by the courts.

There are no Florida cases that hold to the contrary. The Supreme Courts of New York, Illinois, Tennessee, Louisiana, Indiana, Ohio, Mississippi, North Carolina and Alabama hold to the same effect. See particularly *Hill v. Atlantic & N. C. R. R. Co.*, a North Carolina case, 55 S. E. 854.

Falconer v. Simmons,
41 S. E. 193, 51 W. Va. 172;
State v. Cowan,
35 Atl. 354, 83 Md. 549;
Vermont & C. R. Co. v. Vermont Cent. R. Co.,
21 Atl. 262, 63 Vt. 1;

State v. O'Neil,
126 N. W. 454, 147 Iowa 513

Ray v. Western Penn. Natural Gas Co.,
20 Atl. 1065, 138 Pa. St. 576

Farrior v. New England Mortgage Security Co.,
9 So. 532, 92 Ala. 176

Wisconsin Lumber Co. v. State,
54 So. 247, 67 Miss. 571

Harris v. Jex,
55 N. Y. 421, 14 Am. Rep. 285

State v. Mayor, etc. of City of Bristol (Tenn.),
70 S. W. 1031

Mountain Grove Bank v. Douglas County (Mo.),
47 SW. 944

Levy v. Nitsche (La.),
4 So. 472

Town of Hardinsburg v. Cravens (Ind.),
47 NE. 152

City of Cincinnati v. Taft, (Ohio),
58 NE. 63

The fact that State Courts have adopted this principle, and have cited the decisions of this Court as authority for so doing indicates the influence which this rule has had upon American jurisprudence. The moral duty, and the sense of justice, which underlie the principle that property rights acquired in reliance upon existing and recognized rules of law, whether found in statutes or in decisions of courts, should be protected, and the fact that Federal Courts have heretofore refused to give to decisions of State Courts a

retroactive effect that would destroy contract or property rights of non-residents, have stabilized commerce by creating a feeling of confidence among investors in every state in the Union that has resulted in a nationwide market for securities issued by corporations and political subdivisions of other states.

Section 2, Article III of the Constitution of the United States gives Federal Courts jurisdiction "over controversies between citizens of two or more states". Holders of obligations have heretofore, in the cases referred to, been able to enforce their contract rights in Federal Courts, even though State Courts have at times, by a change of judicial decision, voided similar contracts held by local residents, and State Courts because of these decisions have generally refused to render decisions that would bring about a different result in cases in their jurisdiction.

But Petitioners' position is even stronger because the decree adjudicating Petitioners' bonds legal was rendered in 1924 under Chapter 6868, Laws of Florida, 1915 (Appendix A), which was enacted for the *very purpose* of providing a procedure in a court of general jurisdiction by which *validity of their bonds could be determined in advance of sale.* That Act was intended to eliminate the contingency that bonds might be sold in good faith on the supposition that they were legal, and later be held illegal when the parties could not be placed in statu quo. The Supreme Court of Florida has repeatedly and consistently held that decrees rendered under this statute are conclusive of the legality of bonds. Statements to that effect have been made by the Florida Supreme Court in various forms.

In *Thompson v. Frostproof*, 89 Fla. 92, 103 So. 118, the first case under the statute, it held that a decree of validation "rendered further inquiry into the bonds unavailing". In *Little River Bank v. Johnson*, 105 Fla. 212, 141 So. 141, it held that the only defense that could be made against bonds after validation is "the defense of payment or valid discharge"; in *Sparks v. Ewing*, 120 Fla. 520, 163 So. 112, that a validation decree is res judicata and will not be affected even though the Court should later place a different construction upon the statute under which the bonds are issued; in *B. P. I. of Dade County v. State*, 121 Fla. 703, 164 So. 697, and *Rogers v. Walthall*, 125 Fla. 423, 170 So. 115, that the existence of a lawful indebtedness was "conclusively adjudicated and put in perpetual repose". These decisions merely give effect to the language of Chapter 6868, Section 4, which is plain, explicit and unambiguous:- the decree "shall be forever conclusive against the municipality and its taxpayers", and the bonds "can never be brought into question in any court of this State". The only exception to the broad language of the statute is where there is a lack of constitutional authority. Since the Legislature has no power to validate bonds issued in violation of the provisions of the State Constitution, it has no power to authorize a court to do so. But even cases recognizing this exception held that

> "any matter or anything affecting the power or authority to issue the bonds, as well as the regularity and legality, including questions of law and fact which the Legislature could validate by statute, would be put in repose by a validation decree";

and that

> "even constitutional rights or privileges designed solely for the protection of property rights of individuals, and which they may waive, or with reference to which they may estop themselves are also put at rest".

So general had been the acceptance of this construction of the statute by the Florida Courts that the Fifth Circuit Court of Appeals itself in *Green v. Uniacke*, 46 Fed. (2d) 916 held that a decree under the Florida Validation Statute

> "put in repose anything affecting the authority of their maker to issue them, or the regularity or legality of the issue, having the effect of making the question of the validity of the bonds res judicata, and preventing further litigation as to this question".

In *U. S. v. Heyward*, 98 Fed. (2d) 433, it cited the *Green* case, and held that a decree

> "estops the Town, its taxpayers and citizens *from ever attacking their validity* (the bonds)".

Chapter 6868, Laws of 1915, is not peculiar to Florida. It was copied from a statute of Georgia. (Weinberger v. B. P. I. 93 Fla. 470, 112 So. 253). The Supreme Court of Georgia holds that a decree of validation is conclusive and res judicata of the validity of bonds. *Holton v. Camilla*, 68 S. E. 472. The Supreme Court of Mississippi also holds that a decree under a statute of that state (which is almost identical with the Florida Act) is res judicata of validity. *Love v. Yazoo City*, 138 So. 600, 91 Miss. 535. This Court in *Fidelity National Bank v. Swope*, 274 U. S. 123, 71 L. ed.

959, held that a validation decree under a Kansas statute was res judicata, and that decision has been freely quoted and often cited by State Courts. It said that the fact that the municipality was plaintiff, and that the decree was in favor of the municipality, did not prevent the decree from being equally as binding upon the municipality as a decree rendered against it.

It is worthy of note that no attack has been made upon the decree validating Petitioners' bonds; that decree stands unchallenged; no charges of corruption, over-reaching or of other wrong-doing have been made against either the officials of the Town or against purchasers of the bonds. The record shows that the Town intended to issue valid bonds, and thought that it had done so; that the taxpayers thought so. For years payments were made in accordance with the contracts. The factual background of this case closely resembles that of *Columbia County v. King*, 13 Fla. 451, where the Florida Court refused to reverse its former opinion and use its power to hold the bonds void in order to relieve taxpayers of a burden that had been unwisely created by their officials.

Moreover, since the decision of the Circuit Court of Appeals in this case, on June 2, 1941, the Supreme Court of Florida has decided the case of *State v. City of Venice*, 2 So. (2d) 365. In that case the validity of the bonds was challenged because *no election* had been held as required by the City Charter. The Court said "the question of the validity of these bonds in this regard was forever set at rest" by the validation decree, citing *Sparks v. Ewing*, 120

Fla. 520, 163 So. 112. The quoted statement is the Court's answer to one of the questions presented for decision.

In *Sparks v. Ewing*, supra, the bonds were attacked because they had been issued without the approval of the taxpayers at an election as required by the Charter. The courts said that the validity of the bonds

> "was not now an open one as to bonds that have been validated by a judicial decree which is res judicata; no appeal having been taken therefrom".

The Supreme Court of the State of Mississippi, in *Love v. Yazoo City*, supra, held that a decree of validation under the statute of that state was res judicata where no appeal had been taken. The only distinction between the *Venice* case and this case is that in the *Venice* case no election was held. In this case an election was held. According to the Court's construction of the *Belleair* charter there were no qualified voters.

Chapter 6868, Laws of 1915, does not require an appeal to the Supreme Court as a condition precedent to the decree being res judicata of the validity of the bonds. Jurisdiction of the validation proceeding is vested by the statute in the Circuit Court, and its decree is declared to be forever conclusive.

Hence under the recent decision of this Court, in *Vandenbark v. Owens-Illinois Glass Co.*, decided January 6, 1941, advance opinions L. ed. Vol. 85, p. 317, the decision of the Circuit Court of Appeals should be reversed since the decision in *Olds v. Alvord* is no longer the law of the State of Florida.

Since *Olds v. Alvord*, supra, therefore, is the only case where a Florida Court has held that the failure of the Town to comply with the Charter or other statutory requirements was not put in repose by a validation decree, that decision is not now and never was "the law of Florida". It does not represent a rule of law and should not have been considered as binding on the Federal Courts in actions brought under the jurisdiction given them by the Federal Constitution. Petitioners' rights rest on the broad principle of justice and public morals that require the decision of this case to be controlled by the law of the state at the time the bonds were issued, because, as the Florida Court has said, such a rule is necessary to avoid "an outrage on justice", and "the injustice and oppression of any other rule would be so great as to be judicially intolerable". Either under this broad principle of justice, or under the more technical one requiring the Federal Court to follow a decision of the State Court made sub judice announced in the *Vandenbark* case, supra, the decision of the Circuit Court of Appeals must be reversed.

II.

The decision of the Fifth Circuit Court of Appeals holding that the decision of the Florida Court in *Olds v. Alvord*, supra, is conclusive of the invalidity of the Plaintiffs' bonds and that the Federal Courts by reason of the decision of the State Court, made fifteen years after the bonds had been decreed valid, are bound to hold Petitioners' bonds void because the Florida Court held the bonds of other

holders void, deprives Plaintiffs of property without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

Petitioners' rights rest upon the contract in the bonds which a Florida Court of general jurisdiction held to be valid before Petitioners purchased. That judgment has never been set aside or reversed; it was rendered under the authority of a valid statute of Florida which gave the Circuit Court jurisdiction of the cause and declared that its judgment would be forever conclusive of the validity of the bonds. The statute was passed for the purpose of enabling the Town to secure a final determination of validity before bonds were issued. Petitioners purchased in reliance upon the statute and decree,- the law of Florida at the time the bonds were issued. The final decree of validation made in accordance with the statute, Petitioners' privity of contract with the Town, and the consideration received by the Town, vested Petitioners with property or contract rights of which they can not be deprived by a decision of a Florida Court rendered, fifteen years after the bonds had been issued, in a case to which Petitioners were not party. It is of the very essence of due process of law that a final judgment cannot be annulled or set aside except by an action brought for that purpose, and that all parties having a vested interest in that judgment shall be made parties and be accorded their day in court upon the issue tendered. The Bill of Complaint in *Olds v. Alvord,* supra, did not seek to set aside or annul the decree of validation. Petitioners were residents of states other than Florida. As this Court held in *Ayres v. Carver,* 17 How. 591, 15 L. ed. 179, if they stayed out of the suit in the State Court their rights would not

be affected. Petitioners did stay out of that suit. To hold a decree of the State Court, made under such circumstances, conclusive and binding upon Federal Courts in this case is to deny Petitioners their constitutional right of access to the courts of the United States; to nullify the power of a Federal Court to *decide a case* in this forum brought under the authority of Section 2, Article III of the Constitution of the United States; it will, as Justice Taney said in *Rowan v. Runnells*, supra, render that section of the Constitution "utterly useless and nugatory"; it will deny them that due process of law which is guaranteed by the Constitution itself. The action of the lower court in this case is not a decision; it is merely a declaration that Petitioners' case had been decided by the State Court before Petitioners' suit was tried; that the Federal Court was precluded from deciding the case. The Constitutional grant of power to Federal Courts to adjudicate controversies between citizens of different states, was intended to impose upon Federal Courts the duty of deciding those cases according to law, and that duty cannot be performed by automatically registering the will of a State Court. The decision of the State Court in *Olds v. Alvord* deprived the bondholders, party to that case, of property rights that had been adjudged by a Florida Court to have become vested, and was contrary to the express provisions of Chapter 6868, Laws of Florida, which made the decree of validation conclusive. This Court, sitting as the supreme court of judicature for the nation, is not bound by a decision of a Florida Court rendered under those circumstances to deprive these Petitioners of their right merely because the Florida Court deprived other holders of their rights. Section 10, Article I of the Constitution was

intended to provide protection for non-resident property owners and contract holders against loss of rights or property by state action. True, it is limited to prohibiting impairment of the obligation of a contract by passing a law; equally true is it that this Court in the past has held that a violation of this section does not occur as the result of a change of decision by a State Court after contract rights have become fixed. But those decisions were rendered prior to the decision of this Court in *Erie R. R. Co. v. Tompkins*, and during a time when the phrase "laws of a state", as used in the Rules of Decision Act of 1789, was construed as including only "statutes" of a state. That decision held that "laws of a state" include the decisions of state courts. This must mean decisions that were in effect at the time the contract was made. Due process requires a rule of law. It does not mean a mere decision. For law must be a rule applicable to all alike. If *Erie R. R. Co. v. Tompkins* be given the effect given to it by the Fifth Circuit Court of Appeals, State Courts are free to destroy the rights of non-residents by deciding cases to which they are not parties, and compel all Federal Courts, including this Court to do the same, even if those decisions impair the obligation of contracts, or deprive non-residents of their property rights. The importance of granting judicial protection to contracts valid when made is so great that this Court must hold that where a State Court holds otherwise, Federal Courts will nevertheless determine the rights of parties according to law. Otherwise Petitioners will not have been accorded due process. They will not have had a right to have their case tried according to the law of the land.

The statement of Justice Davis which we have quoted, the comment of the Florida Court in *Columbia County v. King*, supra, and the statement of Justice Whitfield in *State ex rel Nuveen v. Greer*, 88 Fla. 249, 102 So. 739, as well as the decisions of this and other Courts, hold that justice and equity forbid the destruction by judicial decision of contracts, valid when made. Such action would violate long accepted principles of simple justice and morals, and undermine confidence in the fairness of courts and the enforceability of contracts made in good faith.

GILES J. PATTERSON,

Attorney for Petitioners.

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BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

In support of the Petition for Certiorari heretofore filed in this Court, we submit herewith a short memorandum.

Point I.

The statement of the principle of law at the bottom of page 5 and top of page 6 of the Petition for Certiorari is copied verbatim from the opinion of this Court in *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968.

At the bottom of page 7, the statement is made that "this principle was first adopted in England." In support of this, we quote the following:

> "Where a decision construing a contract or a statute upon which a much used contract is founded has long been acted upon, it will be considered that subsequent contracts have been entered into subject to it, and the decision will be followed even though the court would not have come to the same conclusion in the first instance." 2 *Am. & Eng. Encycl. of Law, Vol.* 86, *p.* 182.

In a note to the foregoing statement, the following English cases are cited:

In Re Wallis, 25 Q. B. D. 176
Pandorf v. Hamilton, 17 Q. B. D. 670
Phillipps v. Rees, 24 Q. B. D. 17
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At the bottom of page 7 of the petition, it is stated that the principle "has been generally accepted by all American courts", and on pages 10 and 11, selected decisions by various State Supreme Courts are listed. We quote from 14 Am. Jur. p. 345, paragraph 130:

> "Where a constitution or statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts

may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision."

On page 346 decisions by courts of various states are cited to support the text.

Erie Railroad v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, must, therefore, be construed in the light of this long accepted principle which is the foundation of all contract and property rights. The rule that the law of the state, including the decisions of the state Supreme Court, is conclusive on the Federal Courts, must be construed as being subject to this exception.

The quotations on the bottom of page 13 and top of page 14, of the Petition are taken from the opinion of the Florida Supreme Court in the case of *Weinberger v. B. P. I.,* 93 Fla. 470, 112 So. 253, which language has been quoted and approved in *City of Ft. Myers v. State,* 95 Fla. 704, 117 So. 97. It is quoted or restated in *Roundtree v. State,* 102 Fla. 246, 135 So. 888, text 894, *Little River Bank and Trust Co. v. Johnson,* 105 Fla. 212, 141 So. 141, and in *Sparks v. Ewing,* 120 Fla. 520, 163 So. 112.

(Chap. 6868, Laws of Florida is attached hereto as Appendix A).

Point II.

It is true that the decree of the State Court rendered in 1924 holding the bonds valid was that of a Circuit Court, but since it was not appealed, that decision was final, and conclusively established the validity of the bonds. The

judgment was res judicata and the rights of the petitioners in that judgment were vested by purchase of the bonds. These rights could not be divested except by a decree of the State Court setting aside the decree of validation. A Federal Court has no power to vacate a judgment of a State Court. Petitioners were not parties to any suit to vacate the judgment of validation, hence, that judgment is still binding.

The effect of the decision of the Florida Supreme Court in *Olds v. Alvord*, 191 So. 424, was to ignore the judgment of validation. The decision of the Federal Court goes further. It holds that the decision of the State Court is conclusive and binds the Federal Courts to do likewise.

In *Coombes v. Getz*, 285 U. S. 446, 76 L. ed. 873, this Court held that

> "a contractual obligation arose and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Article 1, Section 10, *and the due process of law clause in the 14th Amendment of the Federal Constitution.*"

In that case the holding of the Court was based upon the fact that the creditor had extended credit to the corporation, in reliance upon the stockholders liability and that

> "his action in so doing, under the state constitutional provision, brought into force for his benefit the constitutional obligation of the director".

Likewise here, the purchase of bonds in reliance upon the decree was an extension of credit by the plaintiffs to the corporation, which brought into force for their benefit the obligation of the city which had been declared to be a valid one, and vested Petitioners with a right which comes within the protection of the due process clause of the 14th Amendment.

The *Coombes* case, supra, was decided upon a writ of certiorari issued to the Supreme Court of the State of California. It was not a question of following State Court decisions, but rather a one of enforcing vested contract rights which would otherwise have been destroyed by the decision of the State Court in violation of the provisions of the 14th Amendment. See also *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 74 L. ed. 1107.

GILES J. PATTERSON,
Attorney for Petitioner.

ERRATA IN PETITION

The Petition, page 18, erroneously refers to *Ayres v. Carver*, 17 How. 591, 15 L. ed. 179. The reference should have been, *Brown v. Trousdale*, 138 U. S. 389, 34 L. ed. 987.

On page 3 of the petition the statement that the certificate "was authorized by Section 2, Chapter 6868," should read "by Section 5".

APPENDIX "A"

Chapter 6868, Acts of 1915

SECTION 1. (5106) *By petition in the circuit court.*— When any county, municipality, taxing district, or other political district or subdivision, desiring to incur any bonded debt or to issue certificates of indebtedness, shall hold an election for that purpose in accordance with the provisions of the laws of this State controlling and regulating such elections, and the returns of such election shall show prima facie that such election is in favor of the issuance of said bonds or certificates, or when any county, municipality, taxing district, or other political district or subdivision shall adopt any ordinance or resolution, or take any other action required by law, for incurring any bonded debt or issuing certificates of indebtedness under the laws of this State, such county, municipality, taxing district, or other political district or subdivision shall have the right, if it deems it expedient, to determine its authority to incur bonded debt or to issue certificates of indebtedness and the legality of all proceedings had or taken in connection therewith, by filing a petition against the State of Florida in the circuit court of the county in which such election has been held or other proceedings have been had or taken.

SECTION 2. (5107) *Necessary allegations of petition; order to show cause; service on State Attorney; duty of State Attorney; records to be furnished; notice to taxpayers.* The authority for incurring such bonded debt or issuing certificates of indebtedness, the fact that an election has been held and that such election was in favor of the issuance of bonds or certificates, if an election be required, the

ordinances or resolutions authorizing their issuance, and the fact of their adoption and all essential proceedings had or taken in connection therewith, the amount of the bonds or certificates to be issued, what interest they are to bear, and when and where principal and interest are to be paid, shall be briefly set out in said petition by proper allegations, references or exhibits. The judge of said court shall, on the filing and presentation of said petition, issue an order against the State of Florida requiring it, through the State Attorney in said judicial circuit to show cause at such time and place within a county in said circuit, to be designated in said order, which time shall be not less than twenty days, nor not more than thirty days, after the issuance of said order, why said bonds or certificates of indebtedness should not be validated and confirmed. A copy of said petition and order shall be served on the State attorney of the circuit in which said proceedings are pending at least eighteen days before the hearing fixed in and by said order. It shall be the duty of the State attorney to carefully examine said petition, and if it appears to him, or if he has any reason to believe that said petition is defective, insufficient or untrue, or if, in his opinion, the issuance of the bonds or certificates in question, have not been duly authorized, he shall make such defense thereto as to him shall seem proper. Any officer, agent or employee, who has charge, possession, custody or control of any of the books, papers or records of said county, municipality, taxing district or other political district or subdivision, shall, on demand of the State attorney, exhibit to him for examination said books, papers and records, and shall, without cost, furnish to him duly authenticated copies of such books, papers and records, which pertain to the proceedings for the issuance of said

bonds or certificates or which might affect the legality of the same, as he shall demand. Prior to the hearing of said cause, the clerk of said court shall publish in a newspaper published in said county, once each week for at least three weeks before the hearing, the first publication to be at least eighteen days before said hearing a notice addressed to the taxpayers and citizens of the county, municipality, taxing district, or other political district or subdivision proposing to issue such bonds or certificates, requiring them, at the time and place specified in the order providing for the hearing of said cause, to show cause, if any they have, why said bonds or certificates should not be validated and confirmed: Provided, however, that if a newspaper is published in the municipality, taxing district, or other political district or subdivision proposing to issue bonds or certificates of indebtedness, then said notice shall be published as aforesaid in a newspaper published in such municipality, taxing district, or other political district or subdivision. By the publication of said notice all taxpayers and citizens of such county, municipality, taxing district, or other political district or subdivision shall be considered as parties defendant to said proceedings, and the court shall have jurisdiction of them the same as if they were named as defendants in said petition and personally served with process.

SECTION 3. (5108) *Hearing; order; final decree; appeal.*— At the time and place designated in said order, the judge of said circuit court shall proceed to hear and determine all questions of law and of fact in said cause, and he shall make such orders as to the proceedings in said cause and adjournments as will best conserve the interest of all parties and enable him to render a final decree with the

least possible delay. Any taxpayer or citizen may become a party to said proceedings; and any party thereto, whether petitioner, defendant or intervenor, dissatisfied with the decree of the court, may appeal therefrom to the Supreme Court within fifteen days after the entry of such decree. Such appeal shall be effected by the filing and recording in the chancery order book in the office of the clerk of the circuit court of the county wherein said proceedings are pending returnable in the Supreme Court not less than fifteen days nor more than twenty days after the filing and recording of such notice of appeal. On or before the return day of said appeal the appellant shall file in the Supreme Court a certified copy of all of the said proceedings, including a transcript of all the evidence taken therein before the court. Upon application of either party, such evidence shall be duly certified by the judge who heard said cause and entered the decree appealed from.

The certified copy of all of said proceedings, as aforesaid duly filed in the Supreme Court, shall constitute the record upon which said appeal shall be heard in the Supreme Court.

Within ten days after the return day of such appeal the appellant shall file his brief in the Supreme Court and shall deliver a copy thereof to the appellee or his attorney of record, who shall within five days thereafter file his brief, and shall deliver a copy thereof to the appellant. After the time for filing brief as aforesaid has expired the Supreme Court shall proceed to consideration of said cause upon the record and briefs: Provided, however, that if either party shall file a request in writing for oral argument by the return day of such appeal, the court may enter an

order setting down said cause for oral argument for the earliest practicable date: Thereafter the Supreme Court shall give immediate consideration to said appeal and render its decision thereon in due course. Such decision shall be final after ten days and mandate shall issue forthwith, if no petition for rehearing has been filed.

Such appeal shall take priority in the Supreme Court over all other civil cases therein pending, except habeas corpus.

This section shall not affect any appeal pending June 4, 1927, but it shall apply to all such causes which have not been finally heard by the judge of the circuit court, and in which a final decree has not been entered.

SECTION 4. (5109) *Conclusiveness of decree.*— In the event no appeal is taken within the time prescribed herein, or if taken, and the decree validating said bonds or certificates is affirmed by the Supreme Court, the decree of the circuit court validating and confirming the issuance of the bonds or certificates shall be forever conclusive as to the validity of said bonds or certificates against the county, municipality, taxing district, or other political district or subdivision issuing them, and against all taxpayers and citizens thereof; and the validity of said bonds or certificates shall never be called in question in any court in this State.

SECTION 5. (5110) *Stamping bonds or certificates validated.*— Bonds or certificates, when issued under the provisions of this Article, shall have stamped or written

thereon by the proper officers of such county, municipality, taxing district or other political district or subdivision issuing the same, the words: "Validated and confirmed by decree of the circuit court" (specifying the date when such decree was rendered and the court in which it was rendered), which shall be signed by the clerk of the circuit court in which the decree was rendered, which entry shall be original evidence of said decree in any court in this State.

SECTION 6. (5111) *Costs, by whom paid.*— The costs in any case under this Article shall be paid by the county, municipality, taxing district, or other political district or subdivision issuing such bonds or certificates, except in case a taxpayer or citizen shall intervene, and in that event, the court may tax the whole or any part of such costs against the intervenor as shall be equitable and just.

SECTION 7. (5112) *Suits instituted under prior laws not affected.*— No suit instituted under any law prior to the approval of this Article shall be abated or affected by this Article, and all such suits shall proceed according to the terms of said law until they are finally determined.

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FILED
SEP 10 1941
CHARLES ELMORE CROPLEY
CLERK

No. 504

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

JOHN C. GETZ ET AL,
PETITIONERS,

v.

TOWN OF BELLEAIR,
A Municipal Corporation,
RESPONDENT.

BRIEF OF RESPONDENT, TOWN OF BELLEAIR, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

O. K. REAVES,
Tampa, Florida,
Counsel for Respondent.

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TOWN OF BELLEAIR,
A Municipal Corporation,
RESPONDENT.

BRIEF OF RESPONDENT, TOWN OF BELLEAIR, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

John C. Getz and others seek a review by certiorari of the judgment of the United States Circuit Court of Appeals for the Fifth Circuit handed down June 2, 1941 (*John C. Getz et al., appellants, v. Town of Belleair, appellee*, 120 F. (2) 494, reported in Advance Sheet of July 21, 1941), reversing a judgment of the United States District Court for the Southern District of Florida.

A CONCISE STATEMENT OF THE CASE

The "Statement of the Case" (pp. 2 *et seq.* of the petition) is sufficiently accurate and full. We, therefore, adopt said statement of facts, but we do not

concur in various legal conclusions and implications contained in said statement.

ARGUMENT

We perceive no ground upon which this Court should grant certiorari. As we see them, the petition and brief are bad in form and in substance. The petition is chiefly a legal argument, not indexed, and we do not find any prayer therein for writ of certiorari, although the title suggests that purpose, and the brief is a meager supplement to the petition; no serious effort to observe the requirements of the rule seems to have been made in either.

Passing matters of form, however, we find substance fatally lacking. Two points (in reality the same) are stated and relied upon by petitioners. Under Point I they argue that the Florida court had construed the bond validating statute (Appendix "A" of petitioners' brief) to mean that bonds so validated could never be held void on any ground, and that the bonds in question were issued and sold under that state of the law and, therefore, the Florida Supreme Court could not invalidate the bonds by holding as it did in *Olds v. Alvord* that, since the Town of Belleair had no power to issue bonds, the bonds were void *ab initio,* that the validating statute had no application, and that the decree of the Circuit Court, under said statute, purporting to validate said bonds could not and did not breathe life into them. Under Point II they argue that the purchase of the bonds upon the faith of the validating decree of 1924 created a vested right which the State court could af-

fect, if at all, only by vacating the validating decree, which has not been done.

Petitioners lean heavily upon the case of

> *Gelpecke v. City of Dubuque,*
> 68 U.S. 175, 17 L.Ed. 520,

which holds that

> "If the contract when made was valid by the laws of the State as then expounded and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent legislation or decision of its courts,"

and argue that this rule is not affected by *Erie Railroad v. Tompkins.* It is quite unnecessary to determine what, if any, effect the latter case has upon the former; the facts in the instant case do not come within the rule of the Gelpecke case.

The same is true of the case of

> *Columbia County v. King,*
> 13 Fla., 451.

There Columbia County had issued bonds in aid of a railroad under a statute which the Supreme Court had held to be constitutional. Later the Florida court held the statute to be unconstitutional. The case simply decided that a change of decision by the Florida court after the bonds were issued and sold did not affect their validity. No such situation appears in the instant case.

Various answers to petitioners' argument may be briefly stated as follows:

1. At the time the bonds in question were issued, validated, and sold — namely, in July, 1924 — there had been no decision of the Supreme Court of Florida construing the validating statute to have any such meaning as opposing counsel contends (nor, with apologies to him, has there been any such construction at any time); on the contrary, the earliest of the various cases cited and relied on by counsel (p. 13 of the petition) is that of *Thompson v. Frostproof,* which was decided in February, 1925.

2. None of the cases cited by counsel holds that bonds issued by a municipality *which was not empowered by law to issue bonds* could be validated under the validating statute. *Olds v. Alvord* was the first case involving that question. The Court had, however, declared many qualifications and limitations upon the application of the statute:

Such a decree does not

> ". . . cure a patent violation of a command or prohibition of the Constitution."
>
> *Weinberger v. Board of Public Instruction,* 93 Fla. 470, 112 So. 253.
>
> *State v. Hillsborough County,* 113 Fla. 345, 151 So. 712.
>
> *State v. Crandon et al.,* 115 Fla. 153, 155 So. 667.

Such a decree does not adjudicate but rather presupposes the existence of a bonding unit.

> *Municipal Bond & Mortgage Corp. v. Bishop's Harbor Drainage Dist.*, 133 Fla. 430, 182 So. 794.

In this case it was held that bonds of a drainage district which did not legally exist were not made valid by a validating decree.

Questions not necessarily involved or put in issue in the validating proceedings are not concluded thereby.

> *Sparks, Mayor, et al., v. Ewing, et al.,*
> 120 Fla. 520, 163 So. 112.
>
> *State v. Town of Belleair,*
> 125 Fla. 669, 170 So. 434.

The question whether certain lands embraced within a municipality are so rural that they cannot constitutionally be subjected to taxation for municipal purposes is not foreclosed by a validating decree.

> *City of Winter Haven v. A. M. Klemm & Son,*
> 132 Fla. 334, 181 So. 153.
>
> *State v. City of Pompano,*
> 113 Fla. 246, 151 So. 485.
>
> *State v. City of Coral Gables,*
> 114 Fla. 326, 154 So. 234.

Where disconnected tracts of land were attempted to be incorporated by the inhabitants under the gen-

eral law of Florida and bonds were issued and judicially validated, the taxable liability of the separated tracts to pay the bonds, or whether such lands were *de jure* or *de facto* a part of the municipality, was held by this Court not to be foreclosed in

> *Ocean Beach Heights v. Brown-Crummer Inv. Co.*, 302 U.S. 614, 58 S. Ct. 385, 82 L.Ed. 380.

and that decision was cited and approved by the Florida court in the Klemm and Pompano cases, *supra*.

It is, therefore, apparent that *Olds v. Alvord* did not change any opinion previously rendered but decided a point not theretofore passed upon by the Florida court.

3. *Olds v. Alvord* holds in effect that the Circuit Court was without jurisdiction to validate municipal bonds *where the municipality was not empowered by law to issue bonds*; hence the decree of validation was a nullity and subject to collateral attack. Lacking jurisdiction of the subject-matter, jurisdiction of the parties—citizens and taxpayers—was not obtained by the constructive service (publication) provided for in the statute.

4. Absent the decree and judgment role in the suit to validate the bonds, this Court cannot determine that the decree in that case has the effect contended for by petitioners, even if the underlying basis of petitioners' contention were sound.

5. Petitioners were parties as members of a class to the action in the State court (*Olds v. Alvord*), and

for that reason are bound by the judgment rendered in that case. If that judgment was erroneous the remedy was by certiorari therein to this Court. If petitioners were not parties the Federal Court was nevertheless bound to hold the bonds to be void, because the State court had so held as to the Olds bonds, which were identical, and the Federal Court was bound to follow the State court. Therefore, whether the Circuit Court of Appeals acted under the rule of *res judicata* or *stare decisis,* the same result was reached. However, the record discloses that petitioners were made parties under the class-suit rule and are, therefore, as much bound by the decree in that case as if they had been named and brought into court by personal service.

Class-Suits Statute and Proceedings In State Court Examined

Reviewing briefly the Florida statute and proceedings, we find that Section 14 of the 1931 Chancery Act of Florida is the same as Federal Equity Rule 38, which was superseded by the Rules of Civil Procedure, and reads as follows:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

In the suit in the State court by taxpayers of the town of Belleair to enjoin the collection of taxes theretofore levied and the further levy and collection of

taxes to pay the bonds in question, it was alleged that, in addition to the holders of bonds named as defendants therein, there were many others whose names were unknown to the plaintiffs, and

> ". . . that it is impracticable to bring all bondholders before the Court, and this action is, therefore, brought against said named bondholders personally and as representatives of a class, to-wit, the class of holders of said bonds to which they belong. Plaintiffs further aver that the other bondholders, whoever they may be, have a common and general interest with the said named bondholders in the subject matter of this action" (R. 71).

Olds and Newberry, two of the named bondholders, appeared and vigorously contested through the Circuit and Supreme Courts of Florida. In their answer, they aver that they

> *". . . own bonds or coupons of the Town of Belleair of all of the issues which are attacked in the bill of complaint"* (R. 100),

and then they say that the plaintiffs have more knowledge than they claim of the ownership of the bonds, and put in issue the good faith of suing said bondowners as a class (R. 100-101). The final decree of the State circuit court, paragraph 3 (R. 43), says:

> "It appears from the record in said cause that the holders of the bonds herein referred to and herein named constitute a class in the aggregate so numerous as to make it impracticable to bring them all before the Court, and

> the bill was, therefore, properly brought against the bondholders herein named personally and as representatives of a class, to-wit: The class of holders of the issues of bonds described in the bill of complaint and hereafter described; that all such bondholders have a common and general interest in the subject matter of this action, including the parties defendant now before the Court, to-wit: R. E. Olds and Truman H. Newberry, who are fairly representative of all the interests of said classes of bondholders, have an interest in the relief sought, and have actively and aggressively defended the same."

This finding of the Circuit Court was not questioned in the appellate proceedings, and the Supreme Court of Florida treated and dealt with the proceedings as a class suit. *Olds et al. v. Alvord,* 136 Fla. 549, 188 So. 652. Moreover, the District Court in this proceeding specifically found that:

> "The said proceeding in the State Court against the plaintiffs herein as members of a class was regularly conducted according to the law of Florida," etc. (R. 148).

Hence it is that the regularity of the proceedings in the State court as a class suit against the bondholders affirmatively appears from the record, and was specifically found by the trial court.

Class Suits Are Valid and Effective

The recent case of

Hansberry et al. v. Lee et al.,
61 S. Ct. 115 (Advance Sheet of Dec. 1, 1940),

definitely holds, in accordance with previous decisions, that:

> "Where the interests of persons not joined as parties are of the same class as the interests of those who are joined and where it is considered that the former fairly represent the latter in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree" (Headnote 7),

and that:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws subject only to the requirements of the federal constitution" (Headnote 1).

The Supreme Court of Florida has also upheld class-suit actions under the Florida statute.

> *Meier v. Johnston,*
> 110 Fla. 374, 149 So. 185.

In other words, class suits properly conducted under valid state laws in proper cases are binding upon the absent members of the class. On the other hand, if the absent parties do not sustain such relation to the matter in controversy as to place them in the class with the named and litigating parties, the decree is not binding upon the absent parties.

It follows, under the rule announced in *Hansberry et al. v. Lee, supra,* which cites and discusses prior

decisions on the subject, that if the necessary class relationship to the subject-matter litigated in the State court appears as between Olds, the defending member, and Getz, the class member, Getz has had his day in court, the requirements of due process have been satisfied, and the Federal Court cannot afford Getz any relief which would be contrary to the decision of the State court.

Olds and Getz in Same Class

It is true that each bond issued by a municipality is, in a sense, a separate contract, but it is also true that all the bonds in this case were issued as general obligations of the Town, and must of necessity be paid, if at all, by general taxation. Hence it was that whether a tax could be levied to pay the bonds was a matter of common and identical interest to all bondholders.

The distinction between an action upon individual bonds and an attack upon the power to levy a tax to pay any bonds of a given issue because of an infirmity common to all is recognized in

> *Brown v. Trousdale,*
> 138 U.S. 389, 34 L.Ed. 987,

The taxpayers' suit in that case, unlike the suit in the instant case, prayed that the

> ". . . bonds be declared invalid, and all holders thereof be perpetually enjoined from collecting the principal and the interest thereon"

(obvious relief *in personam,* which could only be granted upon personal service), while in the instant case the prayer was:

> "That no tax shall be levied or collected to pay the interest on said bonds or the principal thereof, or the interest upon or principal of any of said bonds";

and that the Town and its officers be permanently enjoined from levying or collecting any general tax

> ". . . for the purpose of paying the interest or the principal, or any part thereof *evidenced by said bonds, or any of them"* (R. 96).

(obviously not requiring a personal decree against bondholders, but only, as to them, determining whether the property in the Town was subject to be taxed to pay their bonds). But the cases are analogous in the respect pointed out by the Court in that opinion that, since

> "The plaintiffs were not prosecuting an action against individual bondholders for the cancellation of individual bonds," but ". . . were attacking the validity of the entire subscription and seeking a decree which would invalidate the entire issue," the ". . . cause of action was not susceptible of division,"

and, therefore, not removable by the non-resident bondholders. It seems evident, therefore, that some bondholders could defend for all in the Belleair case.

This Court, in the Hansberry case, makes several statements which greatly aid in the application of the class-suit principle. The Court says:

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."

To support the first statement of the above quotation, the opinion cites

> *Smith v. Swormstedt,*
> 16 How. 288, 14 L.Ed. 942;
>
> *Supreme Tribe of Ben-Hur v. Cauble,*
> 255 U.S. 356, 41 S. Ct. 338;
>
> *Groves v. Farmers State Bank,*
> 368 Ill. 35, 12 N.E. (2) 618.

It seems too clear to justify amplification that the holders of all general-obligation bonds of the town of Belleair (especially bonds of the same issue and date)

had *"a common right"* and a common interest in the question whether a tax could and should be levied to pay said bonds, and that the interests' representative who appeared and defended was necessarily "the same as those whom they are deemed to represent." In other words, that the interests of Olds and Newberry as bondholders, touching the question of whether a tax could and should be levied to pay the bonds, were identical with the interest of Getz as holder of bonds of the same issue. This Court, however, has prescribed very definite and clear rules to determine the application of class actions in Civil Procedure Rule 23, which says:

> "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> "(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> "(2) several, and the object of the actions is the adjudication of claims which do or may affect specific property involved in the action; or
>
> "(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

It is confidently urged that the case at bar falls definitely within items (2) and (3) of the above quoted

rule. While the bondholders own bonds severally, there was litigated in the State court the "common question of law or fact affecting the several rights" whether a tax could be levied to pay the bonds, and "a common relief" was "sought" — namely, that the Town and its taxing officials be perpetually enjoined from levying a tax to pay the bonds. Moreover, specific property was involved in the action— the property in the Town and its taxable status for the purpose of paying said bonds. The taxable status of given property within the jurisdiction of the court is a thing upon which the court can act, just as the marriage status can be acted upon in the domiciliary jurisdiction of either spouse. It would be difficult to imagine, we submit, a case falling more clearly within said Civil Procedure Rule 23 than the instant case.

In a suit to enjoin the levy of a tax to pay bonds, the bondholders should be made parties.

> *State et al. v. Hillsborough County,*
> 113 Fla. 345, 151 So. 712.
>
> *Denver Land Co. v. Moffat Tunnel Imp. Co.,*
> 284 Pac. 339, and authorities there cited.

It is worthy of note that this Court in *Hansberry v. Lee, supra,* said that the Fourteenth Amendment does not require the State courts or Legislatures to adopt any particular form or rule for establishing the conclusiveness of judgments in class suits or the adoption of the particular rule thought by that court to be appropriate for the federal courts. In short, the court makes it plain that, within the limits of due process, the states are at liberty to say what may

be the subject of class suits, how such suits may be prosecuted, and when they are effective to bind class parties.

It has been pointed out already that the defendant bondholders who contested the State court taxpayers' suit for injunction contended, among other things, that the suit was not a proper class suit, that the contention was overruled by the trial court, and that the Supreme Court of Florida (in *Olds v. Alvord,* 188 So. 652) took cognizance of the fact that it was a class suit purporting to bind defendants not parties, and that finally the Supreme Court affirmed the trial court's decree as to the $300,000 issue (191 So. 441), part of which bonds are here involved.

Thus, under the Florida law, it seems quite plain that a taxpayers' suit, where the bondholders are made parties, and where the facts are as they are here, is the proper subject for class suit. This being true, it would seem that all questions as to the propriety and procedure of the suit as a class suit were eliminated by the Florida court, and that, at most, there could only remain the narrow question whether the guaranty of due process forbids that the State court decree be treated as binding upon class defendants. All questions, save this, are of State law and appear to be settled.

It has not been asserted that to treat the State court decree as binding would deprive plaintiff of due process of law, and we understand that such questions must be raised upon the record before the lower court and ruled adversely before they would be considered

here. It seems obvious that such a contention, if it had been made, could not succeed. The object of the taxpayers' suit was to secure an adjudication that the lands of the taxpayers should not be taxed to pay the bonds, for the reason that they were void. The object of the answer filed by two of the named defendant bondholders was to defend against the objectives of the taxpayers and obtain a decree that their lands should be taxed to pay the bonds in question. The asserted right, on the one hand, to have the taxing power stayed, and the asserted right, on the other, to have it exercised, constituted the *res,* the property, or property right upon which the suit was to operate. This question was vigorously litigated as demonstrated by the number of opinions written by the Supreme Court. If the ones who defended had prevailed, so would have the whole class. The common interest of all bondholders involved was that the Court should hold that taxes could be levied and collected to pay the bonds, some of which were held by the active defendants, others by members of the class. The fact that the right or asserted right involved related to whether lands within the municipality could or could not be taxed to pay the bonds, instead of to a fund or a trust, is only different in degree. Common interest on both sides pervades the whole question. To grant the efficacy of class suits in the cases illustrated in Rule 23 is to establish the efficacy of the decree here involved to bind Getz.

Furthermore, the proceeding in the State court was, as we have shown, *quasi in rem.* The bondholders could not be enjoined from bringing suit to collect their bonds, because that would be a decree *in per-*

sonam, and such a decree could only have been entered against such bondholders as could be personally served, but the taxable status of the lands and other property in the Town could be determined in a suit against the Town and its taxing officials, in which the bondholders had the right to be heard because of their interests in the subject-matter involved; hence they were made parties. So far as the properties had been theretofore assessed and were subject to asserted tax liens, the bill of complaint was in the nature of a bill to quiet title or to remove a cloud from title. The bill alleges that the lands in the Town had been, and were continuing to be, assessed and taxes collected to pay the bonds, and that future assessments and attempted collections would continue unless enjoined. See paragraphs II and III of the bill of complaint (R. 73-74). Hence, we earnestly contend, in addition to the points heretofore made, that:

(1) The State court had jurisdiction to determine whether taxes theretofore assessed to pay the said bonds constituted a lien upon the lands involved, and that the decision of that question foreclosed the question of the right to make future assessments; and

(2) The taxable status of the lands for bond-service purposes was a thing upon which the Court acted and acquired jurisdiction to act.

Thus it becomes apparent that the application of the rule of *res judicata* or of *stare decisis* leads to the same ultimate result—namely, that the judgment of the State court must be followed by the Federal Court under the rule of

Erie Railroad v. Tompkins,
304 U.S. 64, 82 L.Ed. 1188.

The suggestion that the Erie Railroad case does not decide whether it is the duty of the Federal Court to follow the State law as declared by the most recent decision of the State court or some prior decision is an anomaly. Manifestly, a state cannot have at the same time directly opposing and contradictory laws, and the latest decision of a supreme court supersedes prior contrary decisions, but if any question on that point could otherwise be open it is foreclosed by the late case of

Vandenbark v. Owens-Illinois Glass Co.,
61 S. Ct. 347,

wherein this Court says:

> ". . . the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court."

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

O. K. REAVES,
Tampa, Florida,

Counsel for Respondent.

314 U.S. 666 (43)

No. 609

FILED
SEP 13 1941
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1941

JOHN C. GETZ ET AL.,
Petitioners,

V.

TOWN OF BELLEAIR,
a Municipal Corporation,
Respondent.

TOWN OF BELLEAIR,
a Municipal Corporation,
Cross-Petitioner,

V.

JOHN C. GETZ ET AL.,
Cross-Respondents.

Cross-Petition of Town of Belleair for Writ of Certiorari to the United States Circuit Court of Appeals of the Fifth Circuit and Brief in Support Thereof.

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In the

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Cross-Petition of Town of Belleair for Writ of Certiorari to the United States Circuit Court of Appeals of the Fifth Circuit and Brief in Support Thereof.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your cross-petitioner, Town of Belleair, a municipal corporation, prays that writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals of the Fifth Circuit entered on June 2, 1941 (petition for rehearing denied July 2, 1941), in that certain cause wherein John C. Getz, R. P. Lyman, Jr.

and Daniel W. Goodenough were appellants and Town of Belleair, a municipal corporation, was appellee, and from which judgment the said appellants have petitioned this Court for writ of certiorari and have filed the record in this Court. The said final judgment reversed a judgment of the United States District Court for the Southern District of Florida and remanded the cause for further proceedings.

A Short Statement of Matters Involved

John C. Getz et al. sued your cross-petitioner in the United States District Court for the Southern District of Florida upon past-due coupons representing interest on so-called "Public Improvement Bonds" purporting to have been issued by the Town of Belleair Heights on July 1, 1924, and in the alternative, if the bonds are held void, for money had and received, in that the Town received the money for the bonds and used it in the construction of public improvements

After an answer setting up certain defenses had been interposed an "Additional Defense" was filed (R. 55 et seq.), which set up that a suit had been brought in the Florida courts by citizens and taxpayers of the Town to enjoin the levy or collection of any further tax to pay any of three named bond issues of the Town, that the lower court had rendered a final decree of injunction in accordance with the prayer of the complaint, that the Supreme Court of Florida had first affirmed said judgment by an equal division of the Judges but, after several rehearings, finally affirmed said judgment as to the "Public Improvement Bonds" (the $300,000 bond issue, of which the bonds held by Getz and his associates are a part) and reversed the lower court as to the two issues of paving bonds in-

volved in the said litigation. *Olds et al v. Alvord et al.,* 191 So. 434), and averred that the Florida court had decided that the proceeds of the bonds were used for private purposes and not for the public purposes of the Town, and that said question of fact, having once been decided, could not be re-examined. The defendant then moved the District Court to enter a summary judgment in its favor (R. 68).

The District Court, on the first argument, denied said motion (R. 143) upon the ground that

> ". . . since the plaintiffs herein were not named as defendants in the said suit in the State Court and were not served with process therein but were proceeded against as members of a class under Section 14 of the Florida Chancery Act of 1931, they are not bound by the judgment of the State Court holding that the proceeds of the said bonds were used for the benefit of private corporations and not for public purposes of the Town of Belleair."

Shortly after this ruling the case of *Hansberry et al v. Lee et al.* (61 S. Ct. 115, reported in Advance Sheet of Dec. 1, 1940) was published, and on petition for rehearing the District Court reversed its ruling and entered summary judgment in favor of the defendant (R. 146). The District Court found:

> "That the State Court determined and finally adjudged that the proceeds of the bonds sued upon in this cause were used for the benefit of private corporations and not for public purposes of the Town of Belleair";

also:

> "That, in the suit by property owners in the State Court to enjoin the officials of the Town from collecting taxes that had been assessed and were then

unpaid and from making further assessments against the properties in the Town to pay the bonds involved in this action, the plaintiffs, John C. Getz, R. P. Lyman, Jr. and Daniel W. Goodenough, were not made defendants by name, but other holders of similar bonds were named as defendants in their own right and as members of a class—to wit, the holders of similar bonds— and appeared and vigorously defended said action in the State Court, wherein it was adjudged that the bonds were issued, and the proceeds thereof used, for the benefit of private corporations, and that a tax could not be levied against the property in the Town to pay the same. The said proceeding in the State Court against the plaintiffs herein as members of a class was regularly conducted according to the laws of Florida, hence the judgment of the State Court is conclusive upon the plaintiffs as against a claim for money had and received."

The plaintiffs, Getz et al., appealed, and the Circuit Court of Appeals held that

> "Even if the decree in Olds v. Alvord binds this appellant as a class party, it did not adjudicate the use of the proceeds for the benefit of private corporations, as we held in Olds v. Town of Belleair, supra."

The Olds case referred to is reported in 120 Federal (2) 494, Advance Sheet of July 21, 1941, and holds in effect that while the State courts, both Circuit and Supreme, had held that the proceeds of the bonds were used for private purposes, that issue dropped out of the case and was not carried forward in the last decree of the Circuit Court rendered after the case was finally remanded by the State Supreme Court, which decree it held "superseded the other." The facts upon which this holding is based are stated in the "Additional Defense," the supporting affidavits and exhibits attached

thereto (R. 55 et seq.) and the official opinions of the Supreme Court of Florida, viz:

A suit was first brought to validate refunding bonds,

State v. Town of Belleair, 125 Fla. 669, 170 So. 434, in which the Florida Supreme Court said:

> "It was also shown that the $300,000 issue dated July 1, 1924, was for the purpose of 'constructing wharves, ship channels, drive ways, parks, and boulevards in the Town of Belleair Heights,' but that in fact $254,745.64, or more than five-sixths, of it was used for improving the water front (bulkheading and filling in) adjacent to Bellevue-Griswold Hotel Company property; and that the balance was used for a like purpose in front of Coe's property, Coe's road, Wick's property, and the property of Belleair Estates, Inc."

This opinion reversed the decree of the lower court validating refunding bonds, and immediately the taxpayers of the Town brought the suit which culminated in the opinion in *Olds v. Alvord,* 191 So. 434, to enjoin the collection of taxes to pay the bonds, in which the Circuit Judge said:

> "The Court finds that the primary object of these issues and the appropriation of the proceeds of these issues was to benefit the property of either Belleair Estates, Inc., or Bellevue-Griswold Hotel Company, or both, each being a chartered Company of the State or a corporation.
>
> "This Court finds from the evidence that out of the proceeds of one or more of these bond issues part of the Indian Rocks Road was paved. Special reference is made to this particular improvement for it is the only instance where there was an application of proceeds from any of these bond issues to an enterprise, which at the time came under the

> classification of a public benefit. This paving was done on a road which is a connecting link between Clearwater, points north, and Indian Rocks, and was and is much used by the public. This fact, however, cannot alter the finding hereinabove made for the public benefit here noted is comparatively slight and merely incidental." (R. 64.)

The money used on the Indian Rocks road was from an issue of bonds for paving purposes, which is not here involved.

The Florida Supreme Court, by an equal division of its Judges, first affirmed the lower court's decree enjoining the levy of a tax to pay any of the bonds (183 So. 711); then, after several rehearings, the final opinion by a majority of the Court held that the two bond issues for paving purposes could not be held invalid, because the Town was authorized to issue them and the validating decree foreclosed all questions as to the regularity of the proceedings and purpose of the issue, but that the $300,000 bond issue, "Public Improvement Bonds", was void ab initio, because the Town of Belleair Heights, the predecessor of the Town of Belleair, did not have power to issue them (191 So. 434). In said final opinion the Supreme Court said:

> "It so happens that the proceeds of this $300,000 issue was used for building a sea wall and making other improvement which were chiefly beneficial to a private corporation."

The Florida Supreme Court finally *affirmed* the decree appealed from so far as it affected

> ". . . *the proposed tax to be levied and assessed to produce funds from which to pay the principal and interest on the $300,000 bond issue,*"

which was the only relief prayed for and the only relief

granted by the lower court as to said bond issue, but reversed the decree as to the other bond issues and remanded the cause,

> ". . . . with directions that a decree be forthwith entered not inconsistent with the views herein expressed" (191 So. 450).

When the case came back the Circuit Judge entered another decree, in which he dismissed the bill of complaint as to the paving-bond issues, and as to the said $300,000 bond issue for "public purposes" said:

> "That the said $300,000 issue of Public Improvement Bonds issued by the Town of Belleair Heights, dated July 1, 1924, for money received by said Town and used in the construction of sea walls are void ab initio."

This latter decree of the Circuit Court appeared in the record before the Circuit Court of Appeals in the Olds case, but does not appear in the record in the Getz case now before this Court.

It is made plain by the "Additional Defense" (R. 55 et seq.), the affidavit supporting the Motion for Summary Judgment (R. 69 et seq.) and the exhibits made a part of the defense and affidavit that in the said litigation in the State Court brought by the taxpayers seeking to enjoin the levy of a tax to pay the bonds, two major grounds were relied upon as to the $300,000 bond issue, namely:

(a) That the Town had no power to issue them, and

(b) That they were issued for the benefit of private corporations, contrary to Section 7, Article IX, of the Constitution of Florida (see pars. III and IV of the bill of complaint, R. 74 et seq.),

and that the latter ground only was relied upon as a

major ground why a tax could not be collected to pay the paving bonds (see par. V of the bill of complaint, R. 81 et seq.). The lower court based his injunctional order as to all the bonds on ground (b) (R. 42 et seq.) and made no mention of ground (a). Probably he was actuated by the Supreme Court's holding in 170 So. 434 that the bonds were void as having been issued for private purposes.

After this decree was affirmed by an evenly divided court it was on rehearing reversed, as above shown, as to the paving bonds upon the sole ground that the validating decrees had precluded a further examination of the validity of those bonds, but was affirmed as to the $300,000 bond issue upon the theory that, since the Town had no power at the time of this issue to issue bonds at all, the bonds were void ab initio and the validating decree was a nullity. The stated procedure in the State court is the sole basis of the holding of the Circuit Court of Appeals that

> ". . . the issue as to the private object and use of proceeds of these bonds dropped out of the case and was unnecessary to be considered and was in fact not decided in this final decree,"

(referring to the decree of the Circuit Court of Pinellas County dated March 12, 1940, entered after the cause was finally remanded,) and of its further holding that the State court

> ". . . did not adjudicate the use of the proceeds for the benefit of private corporations."

Cross-petitioner's contention on this holding will be stated in the brief appended hereto.

Basis of the Supreme Court's Jurisdiction

This Court is expressly given jurisdiction by Section

240 of the Judicial Code, 28 U. S. C. A., Sec. 347, to review by certiorari judgments of the circuit court of appeals. It also has jurisdiction to entertain cross-petitions for writs of certiorari.

> *Hubbard v. Tod,* 171 U.S. 474, 19 S. Ct. 14, 43 L. Ed. 246.

See also:

> Jurisdiction of Supreme Court, Robertson & Kukham, Sec. 398; Note 30, Sec. 347, Title 28, U. S. C. A.

Such petitions may be entertained within three months after the petition for rehearing in the lower court was denied, which was July 2, 1941.

> *Citizens Bank of Michigan City v. Opperman,* 249 U. S. 448, 39 S. Ct. 330.

Questions Presented

This cross-petition for certiorari involves and presents the questions whether the Circuit Court of Appeals has not refused to be bound by and to observe and follow a decision and determination of a question of fact duly litigated and decided by the Supreme Court of the State of Florida which the law of Florida makes conclusive, and whether it has not directed the District Court to retry and relitigate a question of fact tried and finally determined by the Florida courts, and these questions constitute the reasons relied on for the allowance of the writ of certiorari herein prayed.

Prayer for Writ of Certiorari

Wherefore, your cross-petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals of the

Fifth Circuit, commanding the said Court to certify and to send to this Court, in due course, all matters essential to a consideration of the questions presented by this cross-petition had in the case entitled on its docket John C. Getz et al., appellants, v. Town of Belleair. appellee, No. 9850, to the end that said cause may be reviewed and determined by this Court, as provided by the Statutes of the United States, and that the judgment of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated at Tampa, Florida, this 8th day of September, 1941.

O. K. REAVES
Tampa, Florida
Counsel for Cross-Petitioner.

BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI

Opinions Below

Olds v. Town of Belleair, (5 Cir.) 120 F. (2) 492 (reported in Advance Sheet of July 21, 1941); *Getz v. Town of Belleair,* (5Cir.) 120 F. (2) 494 (reported in Advance Sheet of July 21, 1941).

Concise Statement of the Grounds on Which Jurisdiction Is Invoked

Jurisdiction is invoked upon the grounds that the United States Circuit Court of Appeals has refused to observe and follow decisions of the Florida Circuit and Supreme courts upon a question of fact therein litigated and finally adjudicated and has directed the District Court of the Southern District of Florida to retry and

relitigate said question. The particular question and the manner in which it arose are set forth and explained under the heading "Short Statement of Matters Involved" in the preceding cross-petition (pp. 2-8, inc.) and are, therefore, not amplified here.

A Concise Statement of the Case

The statement in the petition (pp. 2-8, inc.) contains all that is material to a consideration of the questions presented, with appropriate page references to the printed record indicated by the symbol "R", and, to be concise, we refrain from repeating.

Specifications of Errors

The Circuit Court of Appeals erred:

(1) In reversing the District Court;

(2) In remanding the cause for the trial by the District Court of a question of fact which had been tried and decided in the State courts; and

(3) In holding that the decree of the State Circuit Court of March 12, 1940, in *Olds et al v. Alvord et al.* superseded the previous finding and adjudication of that Court and of the Supreme Court that the proceeds of the bonds in question had been used for private purposes and not for the public purposes of the Town of Bellair.

Argument

The opinion of the Circuit Court of Appeals seems to concede

(1) That a question of fact once put in issue, litigated, and decided by a court of competent jurisdiction cannot be re-examined in another court (the Florida

Court has repeatedly so held—*Gaines v. Russ,* 60 Fla. 317, 53 So. 113; *Torrey v. Bruner et al.,* 60 Fla. 365, 53 So. 337; *Connor et al. v. Elliott,* 73 Fla. 217, 74 So. 649; *Hay v. Salisbury,* 92 Fla. 446, 109 So. 617; *Gray v. Gray,* 91 Fla. 103, 107 So. 261), and

(2) That the Florida Circuit and Supreme courts, with the issue before them, had determined that the proceeds of the $300,000 bond issue (of which the bonds of Getz et al. are a part) had been used by the Town for the benefit of individuals and private corporations and not for the public purposes of the Town, but it says that at the very last state of that litigation—to wit, in the judgment of the Circuit Court rendered pursuant to the final mandate of the Supreme Court—

> ". . . the issue as to the private object and use of proceeds of these bonds dropped out of the case and was unnecessary to be considered and was in fact not decided in this final decree."

If we concede that it was not decided ". . . *in this final decree,*" it is true, nevertheless, that the question had been decided, and that decision was not revoked or altered by the said so-called "final decree". Neither the Circuit nor the Supreme court receded from, altered, or modified any question of fact which had been found in the course of litigation in relation to this bond issue; the only change was upon a question of law. After finding the underlying facts—namely, that the bonds were issued and the proceeds used for the benefit of private corporations and not for municipal purposes—the Court first concluded as a matter of law that no tax could, therefore, be levied or collected to pay them, in view of Section 7, Article IX, of the State Constitution. It later changed its opinion of the law as related to the paving bonds and concluded that, notwithstand-

ing they had been issued and the proceeds used for the benefit of private corporations, the taxpayers had overslept their rights by not raising the question in the proceedings to validate the bonds, and that, because of the validating decrees, the said paving bonds must be upheld; but, as to the "Public Improvement Bonds" here involved, the Court did not even change its opinion of the law, because it said the Town had no power to issue bonds at the time they were floated, and hence the validating decree did not save them, and, therefore, affirmed the decree of the lower court as to said bonds. In other words, the sole change of opinion by the Florida court was as to the legal effect of the validating decrees. The decree of the State Circuit Court, pursuant to the mandate of the Supreme Court, superseded the prior final decree as to the part of such other decree which had been reversed, but it had no effect upon that part which had been affirmed. Indeed the lower court was powerless to make any further decree which would affect that part of its former decree which the Supreme Court had affirmed. Moreover, the statement in the final opinion of the Supreme Court that

> "It so happens that the proceeds of this $300,000 issue was used for building a sea wall and making other improvements which were chiefly beneficial to a private corporation"

shows that it had no intention of taking back its previous positive finding (170 So. 434) that the proceeds had been used for the purpose of improving property of private corporations, but, on the contrary, reaffirms that finding. Neither does it have the effect of reversing or in any manner modifying the finding of the lower court in his decree that

"All of said bonds were issued and the proceeds

> thereof used for the primary object of benefiting the property of either Belleair Estates, Inc. or Bellevue-Griswold Hotel Company, or both," etc. (R. 46),

or the amplified finding of the lower court on that question set out in his opinion (R. 63 et seq.).

Judge Sibley, in the above quotation, says the issue as to the private object and use of the proceeds of these bonds "was unnecessary to be considered and was, in fact, not decided in this final decree." Conceding, for the purpose only of answering this suggestion, that the Florida court might have disposed of the $300,000 bond issue by simply saying that the Town had no power to issue bonds and, in the absence of power to issue them, there was no jurisdiction to validate under the validation statute, the answer is that the case was not disposed of in that manner. Nor did the pleadings so restrict the issues. The use of the proceeds was brought in direct issue by the pleadings, and the Court had the right to pass upon all the grounds presented, and did pass upon the particular question as to how the proceeds were used. The rule of law does not go so far as to make it absolutely necessary to pass upon a given question, but

> "A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein," etc.,
> 34 C. J., p. 868.

The essential elements stated appear in this case.

That Getz and his associates were parties to the proceedings in the State court as members of a class—to wit,

the class of bondholders to which Olds and Newberry (who appeared and defended in that suit) belonged—and that they were properly sued and bound as such were specifically found by the District Court (R. 147-8) and not controverted by the Circuit Court of Appeals. Moreover, we have quoted the Florida statute about class suits and amplified this point as related to Mr. Getz and his associates in our brief herein opposing their application for writ of certiorari, to which reference is hereby made if the Court desires to further examine that question. We, therefore, refrain from repeating here what we have there said except to call the Court's attention to the recent case of

Hansberry et al. v. Lee et al., 61 S. Ct. 115, (Advance Sheet of December 1, 1940).

wherein this Court holds that class suits are binding upon absent members of the class, and that, unless State procedure has denied the due process of law guaranteed by the Federal Constitution, the federal courts are bound thereby, and we have shown in our amplified argument above referred to that Getz and his associates did belong to the same class, because their bonds were identical with bonds held by Olds and Newberry, who defended the suit in the State court, and that the relief sought in said suit was to enjoin the levy of a tax upon the property in the Town to pay all bonds of the said issue. There is a clear distinction between an action against individual bondholders for the purpose of the cancellation of individual bonds or to enjoin the payment of individual bonds and an action to enjoin the collection of a tax to pay all bonds of a given issue, which is quasi in rem and affects alike all bonds of the stated issue.

It is, therefore, respectfully submitted that the Cir-

cuit Court of Appeals ignored the binding effect of the judgment of the Florida courts and has directed the District Court to proceed contrary thereto, in violation of the law as declared by this Court in

Erie Railroad v. Tompkins, 304 U. S. 64, 58 S. Ct. 817;

Vandenbark v. Owens-Illinois Glass Co., 61 S. Ct. 347, (Advanced Sheet of January 15, 1941).

and similar cases.

Wherefore, writ of certiorari, as prayed, ought to be granted.

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Counsel for Cross-Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

JOHN C. GETZ, et al.,
Petitioners,

v.

TOWN OF BELLEAIR,
a municipal corporation,
Respondent.

TOWN OF BELLEAIR,
a municipal corporation,
Cross Petitioner,

v.

JOHN C. GETZ, et al.,
Cross Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF CROSS PETITION

The Cross Petition for Writ of Certiorari filed by the Town of Belleair (p. 10) states that jurisdiction of this Court is invoked

> "upon the grounds that the United States Circuit Court of Appeals has refused to observe and follow decisions of the Florida Circuit and Supreme Courts upon a question of fact therein litigated and finally adjudicated".

On page 9, under the heading, "Questions Presented", it says that

> "the Circuit Court of Appeals has refused to be bound by and to observe and follow a decision and determination of a question of fact duly litigated and decided by the Supreme Court of the State of Florida."

These statements are general, and since they do not indicate in what way the Circuit Court of Appeals has refused to follow the State Court, it is necessary to analyze the Petition, and to look to the Brief of Respondent, Town of Belleair, in opposition to our Petition for Certiorari; the Cross Petition (p. 15) refers to the Brief for a discussion of one of the grounds upon which the Cross Petition rests.

The Cross Petition really rests upon two assumptions: (1) that *Olds v. Alvord*, 139 Fla. 745, 191 So. 434, decided by the State Courts of Florida, was "properly a class suit", so that the original Petitioners, Getz, et al., as members of a class are bound by the decision of that case, even though they were not parties thereto; (2) that the Florida Court in *Olds v. Alvord*, supra, has adjudicated not only (a) that the bonds of the Petitioners are void and that they cannot recover on them as such, but also (b) that the proceeds received from the sale of the bonds were expended by the Town for an illegal purpose,—to wit, for the benefit of a private corporation,— so that Petitioners cannot recover

a judgment against the Town upon a common count for money had and received. Since the record shows that these Plaintiffs (Petitioners) were not parties to the suit of *Olds v. Alvord,* supra, both of these assumptions depend upon whether or not *Olds v .Alvord* was in fact "properly a class suit". Before discussing the two assumptions, we call the attention of the Court to the Brief filed in opposition to the granting of our Petition (by reference really made a part of the Cross Petition) which actually supports our contention that the Petition for Certiorari should be granted.

That Brief is one of confession and avoidance; it does not seriously attempt to answer the reasons upon which the Petition rests but avoids the issue, by saying that even if the Circuit Court of Appeals did err in saying that the decision of the Florida Court in *Olds v. Alvord,* supra, was "conclusive as authority" and that it was "bound to follow it", the decision of the Court was correct, because Getz, et al. were bound by the rule of *res judicata.* They were bondholders, and were, therefore, members of the same class as Olds and Newberry, who were parties to the suit. This argument is an acknowledgement that our Petition should be granted, for the Circuit Court of Appeals said, "We do not decide" whether *Olds v. Alvord* was "properly a class suit".

For this Court to deny the Petition for Certiorari for the reasons given by the Town, would amount to a *decision* that *Olds v. Alvord was "properly a class suit"* without these Petitioners having been accorded an opportunity to

be heard on this question of law; it would have the effect of affirming the holding of the Circuit Court of Appeals, and thus make it the law of Federal Courts of the Fifth Circuit. The only question now before this Court is whether it should take jurisdiction of the case; the merits of the case are not now involved. This Court does not decide the questions of substantive law involved in the case upon application for a Writ. It determines only whether those questions *are of such character* as to justify this Court in taking jurisdiction. If the Writ is issued, the parties have an opportunity to be heard upon the merits.

Since the Circuit Court of Appeals expressly held that

> "whether that litigation (*Olds v. Alvord*) was properly a class suit to which all bondholders everywhere were parties, and whether as a result all suffered a loss of their bonds, is an interesting question, and, we think, one of grave doubt",

that statement is not ground for Certiorari. This Court does not sit to review what the Court of Appeals *did not decide*, but only what it *did decide*. Since the Court of Appeals did not decide this question, it is not a matter that this Court will review. It might become involved in a consideration of the merits if the Petition for Certiorari is granted. The Petition of these Plaintiffs is necessarily predicated on the claim that their rights were not adjudicated in the State Court, as well as upon the claim that the Court of Appeals was not conclusively bound to follow the decision of the Supreme Court of Florida. In fact, the Petition goes farther. It contends that if the decision of the Florida Court be construed as having adjudicated the rights of these Petitioners, such adjudication constitutes

a denial of due process, in violation of the Fourteenth Amendment to the Constitution of the United States. We submit, therefore, that the claim that *Olds v. Alvord* was "properly a class suit" is not a reason for *denying the original Petition for Certiorari.*

Claim of Cross Petitioner that the Circuit Court of Appeals did not follow decisions of the Florida Courts.

The complaint of the Cross Petition that the Florida Court did not follow decisions of the Florida State Courts is, as we have already stated, predicated on the assumption that the Florida Court, as the Cross Petition says, has "finally determined" a question of fact, namely, that these Petitioners cannot recover upon a common count for money had and received by the Town from the sale of its bonds. Necessarily, no such question of fact could have been adjudicated against these Petitioners if they were not parties to the suit in the State Court. The Circuit Court of Appeals held that

> "even if the decree in *Olds v. Alvord* binds this appellant as a class party, *it did not adjudicate the use of the proceeds for the benefit of private corporations, as we held in Olds v. Town of Belleair,* supra."

In so deciding, the Circuit Court of Appeals *followed Florida decisions;* for in *Olds v. Belleair,* a companion case, decided the same day, it held that

> "the issue as to the private object and use of proceeds of these bonds dropped out of the case (*Olds v. Alvord*) and was unnecessary to be considered, and *was in fact*

not decided in this final decree. That decree superseded the other. No issues were finally adjudged so as to make estoppel by judgment in a suit *on another cause of action* except those necessarily or actually decided in the final decree."

In making this statement, the Circuit Court of Appeals also followed the Florida Court. It followed a leading decision by that Court, as well as *Russell v. Place,* 94 U. S. 606, 24 L. ed. 214, a decision of this Court. In *Fulton v. Gesterding,* 47 Fla. 150, 36 So. 56, cited by the Circuit Court of Appeals, the Florida Court held:

> "The rule supported by reason and the weight of authority, constrains us to hold that *if it appears from the record of a former judgment offered in evidence as an estoppel that several distinct matters may have been litigated,* upon one or more of which the judgment was rendered, *the whole subject matter of the action will be at large and open to a new contention unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined."*

It cannot be denied that in *Olds v. Alvord* two distinct reasons were made the basis of attack upon the validity of this issue of bonds by the Town of Belleair; nor did *Olds v. Alvord* in any way determine the right of a bondholder whose bonds were void to recover from the Town upon a common count. In order for a judgment to have the conclusive effect referred to in Cross Petitioner's quotation from 34 C. J. 868 (p. 14 of the Cross Petition) it is a condition precedent that the first judgment should be upon *"the same claim, demand or cause of action".* Where the second suit does not involve "the same claim, demand and

cause of action", the first judgment is not a *conclusive bar*, but is, as the Court of Appeals said, a bar only to those issues of fact which were *"necessarily or actually decided"*. *Water Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41; *City of Davenport v. Allen*, 120 Fed. 172; *Kirkpatrick v. McElroy*, 7 Atl. 647 (N. J.); *Henrietta Nat'l. Bank v. Barrett*, 25 S. W. 456 (Texas) *Fritsch Fdry. & Mach. Co. v. Goodwin Mfg. Co.* 100 Mo. App. 414, 74 S. W. 136.

The rule of *res judicata* is primarily intended to produce certainty and to give dignity to judicial proceedings, 30 Am. Jur. 911. The Courts do not look with favor upon an extension of its use to cases where there is doubt. Hence, the burden of proving that the prior judgment has *conclusively determined* an issue involved in a second suit rests upon the defendant who asserts that defense, *Stanley v. White* 43 N. E. 729 (Ill.), and according to *Russell v. Place*, supra, the defendant must make it appear, either from the face of the record or by extrinsic evidence, "that the precise question was raised and *determined*" in the former suit. If there was any "uncertainty on the record", or if "the record leaves the matter in doubt", Defendant had the right to offer extrinsic evidence "showing the precise point involved and *determined*" in the former suit. If no such extrinsic evidence was offered, the question is determined solely from an examination of the record. As the Florida Court so clearly held, if there be several matters litigated, upon either of which the judgment might rest, the whole subject matter of the action will be at large and open to a new contention.

The Circuit Court of Appeals determined affirmatively that the issue of the use of the proceeds of the bonds *was*

not decided by the Florida Court in its final decree in *Olds v. Alvord.* A reading of the opinion of the Florida Court in 191 So. 434, with the final decree referred to by the Circuit Court of Appeals (which is not in the record but which is referred to on page 7 of the Cross Petition) sustains the statement of the Circuit Court of Appeals that this issue was not necessary to be considered by the State Court and was actually not decided by it.

Cross Petitioner cannot by the records above show that the Florida Courts did decide this issue of fact. Its Brief and Petition show that it relies upon deductions, or its own conclusions drawn from the records. This is an admission that there is doubt and uncertainty which, the Florida Court holds, opens the subject matter for a new contention.

The Cross Petition admits that the question of whether the proceeds were used for a legal purpose is a question of fact (p. 11). *Olds v. Town of Belleair,* a companion case to this one, decided the same day, and referred to in the opinion of the Circuit Court ofAppeals for trial of the facts in the District Court, to determine whether

> "there be any relief available under Florida law growing out of the retention or use of Olds' money for municipal purposes",

was tried by the District Court September 8, 1941, resulting in a judgment for the Plaintiff, Olds. The evidence necessarily proved that the money received from the sale of the bonds *was used for a legal municipal purpose*; otherwise the District Court would have rendered judgment for

the Defendant. It would be an anomalous situation for this Court to hold that the decree of the Florida Court in *Olds v. Alvord* of itself conclusively established that the proceeds received from the bonds were used for an illegal purpose, where at a trial of that issue the District Court has adjudicated that they were not.

In conclusion, we call attention to the fact that the Court of Appeals, in holding that the Florida Courts did not adjudicate that the proceeds of the bonds had been used for the benefit of a private corporation, did not refuse to follow decisions of the Florida Court. It followed the rule announced by the Florida Supreme Court in *Fulton v. Gesterding*, supra. It examined the record in the case of *Olds v. Alvord*, and held that under the decisions of the Florida Court, Defendant, Town of Belleair, had not proved its defense. The Cross Petition for a Writ of Certiorari to review that conclusion is merely an application for a review of what is claimed to be an erroneous decision of the Circuit Court of Appeals. This Court does not grant petitions for that purpose unless there are special circumstances that bring the case within the Rules of this Court. The Petition does not purport to show that there are any such special circumstances.

GILES J. PATTERSON,
Attorney for Cross Respondents.